IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1943.

No. .....

THE COUNTRY GARDEN MARKET, INC., *Petitioner,*

v.

CHESTER BOWLES, Administrator, Office of Price Administration, *et al.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A.

The Opinions of the Courts Below.

The opinion of the United States Court of Appeals for the District of Columbia is not as yet reported but appears on Pages 225 and 226 of the Record. The opinion of the District Court also is not reported but appears on Pages 26 to 29 inclusive, of the Record.

B.

Jurisdiction.

I.

The jurisdiction of this Court is sustained by Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 347 (a).

II.

The date of the judgment to be reviewed is March 6, 1944 (R. 226).

III.

The grounds on which the jurisdiction of this Court is invoked are set forth in the reasons for the allowance of the writ in this petition.

IV.

Statement of the Case.

The case has been stated under heading "Statement of Matter Involved" in the petition.

Summary of Argument.

The plaintiff contends that the entire administrative procedure set up by the Office of Price Administration, resulting in a suspension order was not granted by any Act of Congress and can not be implied. That furthermore the suspension order is a penalty which is unconstitutional. Furthermore, Title III, Second War Powers Act, is an unconstitutional delegation of legislative power as no guide or standards are set forth. Also, the Office of Price Administration regulations are vague, indefinite and uncertain so as to make it impossible for a reasonable person to know if he is violating the same.

Argument.

I.

Title III of the Second War Powers Act does not specifically set up an administrative board to try violators of ration orders with power to issue suspension orders. To imply this power would in effect allow any administrative

bureau created by Congress to try and punish violators to the extent of putting a person out of business. This is a dangerous and drastic practice and the Courts have realized the dangers implicit in such a practice. See Wallace vs. Cutton, 298 U. S. 229; United States *ex rel.* Daly vs. McFarland, 28 App. D. C. 552; Iselin vs. United States, 270 U. S. 245, 251; United States vs. Weitzel, 246 U. S. 533.

Furthermore, the Courts have not implied the right of an administrative tribunal to impose a penalty, nor even to enforce a penalty in Court by virtue of an Act of Congress. United States vs. La Franca, 282 U. S. 568; O'Sullivan vs. Felix, 233 U. S. 318; United States vs. Choteau, 102 U. S. 603; Republic Steel Company vs. National Labor Relations Board, 311 U. S. 7; Lipke vs. Lederer, 259 U. S. 557.

The defendants will probably contend that all dealers were licensees, yet they can not point out where Congress defined the manner in which the license was revokable as in the cases of Wright vs. Securities and Exchange Commission, 112 F. 2d 89; Nichols and Company vs. Secretary of Agriculture, 131 F. 2d 651; and Nelson vs. Secretary of Agriculture, 133 F. 2d 543. Furthermore, it is inconceivable for one to contend that an administrative order which prevents a citizen from conducting his business for past conduct, whether good or bad, is not a penalty.

In both of the recent cases decided by this Court, Yakus vs. United States, No. 374, decided March 27, 1944; and Bowles vs. Willingham, No. 464, decided March 27, 1944, Congress expressly set forth by statute the matter involved before the Court, namely, in the former case, Congress made a willful violation of the Second War Powers Act a crime, and in the latter, set forth the method in which rents were to be controlled. Yet in this particular case, everything is left to conjecture and to the will or whim of the

Office of Price Administration as to the manner it is to proceed and to the extent of the penalty it is to mete out.

II.

The Second War Powers Act apparently attempted to give the President of the United States the power over allocation of "any material or facilities," but nowhere in the act are any standards, guides or policies set forth. The Act gives the President an uncontrolled, unlimited discretion in matters of "allocation." The exact, defined legal meaning of "allocation" is elusive. Never before in our juridical history has the term "allocation" been called upon to carry such a heavy burden and for that reason, it is reasonable to suppose that Congress would have meticulously set down a norm or guide to have helped the President exercise his discretion or the discretion of those to whom he delegated such undefined, yet magical power if it intended the word "allocation" to have such a sweeping meaning. Can it be reasonably supposed that the power to "allocate" carries with it the power to put a person out of business by an edict of an administrative tribunal?

This Court has on occasions held that an Act of Congress was unconstitutional if some reasonable standards were not set forth by which an administrative agency is guided. Panama Refining Company vs. Ryan, 293 U. S. 388; A. L. A. Schechter Poultry Corporation vs. United States, 295 U. S. 495.

III.

The regulations which the defendants claimed the plaintiff violated were as follows:

Sec. 6.10 of Ration Order 16:

"Up to May 31, 1943, retailer may sell at lower point value foods in imminent danger of spoilage. (a) If

any foods covered by this order which a retailer has in his inventory are in imminent danger of spoilage and he finds, in good faith, that he cannot dispose of them at their regular point value quickly enough so that they can be used before they spoil, he may sell or transfer them at less than their regular point value. He must, in doing so, comply with the conditions and follow the procedure set forth in this section. This authorization does not, however, apply after May 31, 1943, and no retailer may sell any item below its regular point value, under any condition, after that date.

(b) A retailer may reduce the point value of a food covered by this order when permitted by this section, only to the extent necessary to dispose of it before it spoils.

(c) Whenever a retailer sells or transfers an item of food covered by this order at less than its regular point value, he must sell or transfer that item so long as he has it on hand to any person who is willing to buy or acquire it at that reduced point value which he has posted for it. He must also post a notice where it may be clearly seen and read by his customers showing:

(1) The item that he is selling at the lower point value;

(2) The point value is at which he intends to sell it;

(3) That he is selling that item at less than its regular point value to prevent spoilage.

(d) If a retailer sells or transfers a food covered by this order at less than the regular point value he must make a written report (by postcard or otherwise) within twenty-four hours after he begins to transfer it at the lower point value, to the board for the place where his establishment is located. The report must be signed by the retailer or his authorized agent, and must show:

(1) The name and address of the establishment at which the food is being transferred at less than its regular point value;

(2) The particular reasons why the food is being transferred at less than its regular point value;

(3) The quantity and type of food involved."

Sec. 10.2 of Ration Order 16:

"Transfer to certain persons after March 28, 1943 may be made only for points. (a) Beginning March 29, 1943, no person may sell or transfer foods covered by this order to anyone other than a retailer, wholesaler, or primary distributor, and no person other than a retailer, wholesaler, or primary distributor may buy or acquire those foods, regardless of any contract or other agreement, unless points are given up in the way this order requires.

(b) No points may be given up by, or accepted from, a retailer, wholesaler, or primary distributor for any foods covered by this order transferred to or acquired by him before April 10, 1943."

It is submitted that the above regulations or orders are so indefinite, vague, or uncertain that it is difficult for a person to know whether or not he is violating the same. This Court has held that where the Act is unreasonable or uncertain any attempted prosecution or penalty thereunder is void. Cline vs. Frink Dairy Company, 274 U. S. 45; Connally vs. General Construction Company, 269 U. S. 385; United States vs. Cohen Grocery Company, 255 U. S. 81; Champlain Refining Corporation vs. Corporation Commission of Oklahoma, 286 U. S. 210, 242, 243.

Furthermore, the record discloses that the plaintiff did everything possible to have the meat department employees comply with all the rules and regulations concerning the Office of Price Administration. If good faith is exercised, the Office of Price Administration should not penalize a business of this size. It is impossible to watch each one of over Three Hundred employees when each sale is made, and the impossible is not expected. Hecht Company vs. Bowles, No. 316, United States Supreme Court, decided October Term, 1943.

The record discloses that numerous meetings were called for the employees and the management and at these meetings the management implored the employees to comply with the Office of Price Administration regulations. All the violations charged against the plaintiff were by employees of the meat department; that in view of the instructions to the employees, it is contended that any violations by such employees were beyond the scope of their authority as employees, and the corporation is not bound by their acts if there is no evidence that the officers of the corporation conspired with the employees. Also the evidence against the plaintiff was vague, indefinite, and uncertain as in no case was the employee, who a witness claimed violated the regulation, identified so that the plaintiff could have properly defended itself.

It is also submitted that when the term "meat in imminent danger of spoilage" is used, reasonable men may honestly differ as to the meaning of those terms. If that be the case, can it be said that the regulation in question, Sec. 6.10 of Ration Order 16, is certain, definite, and reasonable? The answer is simple and clear.

Conclusion.

The matter before this Court is more serious than appears at first blush for if it is conceded that the Office of Price Administration has the power and authority to issue "suspension orders" when Congress did not grant it by express words, then the democratic form of government, which our forefathers intended when they gave us our Constitution, no longer exists. The Administrative branch of our government then becomes supreme and the millennium has arrived for the bureaucrats who have gradually encroached on the judicial domain until now they have reached

those heights for which they have sought. This case is not an ordinary one, for it is a perfect example of bureaucratic minds at work to deprive the Courts of its constitutional position. The defendants most likely will argue that the Federal Courts could not have handled the great volume of work involved in these administrative hearings, but that does not justify the encroachment upon the judicial domain without the express Constitutional grant by Congress.

Furthermore, our system of government does not favor "star-chamber proceedings" such as the record discloses in this case, and to allow this power to be inferred by the Office of Price Administration is to weaken our judicial position. This Court must take a stand in this case and thus stop the onflowing rush of bureaucratic power which threatens to displace our constitutional judicial system.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 945

THE COUNTRY GARDEN MARKET, INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the District Court (R. 26–29) and the United States Court of Appeals for the District of Columbia (R. 225–226) are not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on March 6, 1944 (R. 226–227). The petition for a writ of certiorari was filed in this Court on April 29, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the power granted to the President by Section 2 (a) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by Title III of the Second War Powers Act (Act of March 27, 1942), to allocate materials "in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense," includes the power to limit or withdraw an allocation of a dealer in rationed commodities because he has violated the conditions upon which he was permitted to participate in the allocation system.

2. Whether there was substantial evidence in the administrative record to support the findings of the Hearing Commissioner and Hearing Administrator.

STATUTES AND REGULATIONS INVOLVED

The case involves the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 177, 50 U. S. C. App. (Supp. III), sec. 633 et seq.). Section 2 (a) (2) reads, in part:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or

> for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Sections 2 (a) (5) and (6) provide for criminal and civil enforcement suits against persons violating the Act or regulations and orders issued thereunder. Section 2 (a) (8) authorizes the President to exercise his powers through such agency or officer as he may direct and in conformity with rules which he may prescribe.

Ration Order No. 16 (8 Fed. Reg. 6446) provides for the rationing of meats, fats, oils, and cheese. Section 10.2 (a) forbids transfers of foods covered by the ration order to a consumer without obtaining ration coupons. Section 6.10 provides the conditions under which a retailer may in good faith dispose of food in imminent danger of spoiling at a reduced ration point value.

Section 23.1 of Ration Order No. 16 provides:

> *Office of Price Administration may issue suspension orders.* (a) Any "person" who violates this order may, by administrative suspension order, be prohibited from receiving any "transfer" or delivery of, or from selling or using or otherwise disposing of, any "foods covered by this order" or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or

such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security.

The authority to allocate food at the retail and consumer level has been vested in the Office of Price Administration by a series of delegations from the President, the War Production Board and the War Food Administration.[1] The authority conferred specifically permitted restrictions and prohibitions of the transfer of rationed products to violators of Office of Price Administration regulations.[2]

The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order No. 46 (8 Fed. Reg. 1771). At the same time it adopted procedural regulations governing their issuance. Procedural Regulation No. 4 (8 Fed. Reg. 1744).

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the District of Columbia which affirmed the judgment of the District

[1] War Production Board Directive No. 1 (7 Fed. Reg. 562); Executive Order 9125 (7 Fed. Reg. 2719); Executive Order 9280 (7 Fed. Reg. 10179); Food Directive No. 3 (8 Fed. Reg. 2005); Food Directive No. 6 (8 Fed. Reg. 3471); Food Directive No. 7 (8 Fed. Reg. 3471).

[2] War Production Board Directive No. 1, *supra;* Food Directive No. 3, *supra.*

Court (R. 33) denying petitioner's prayer for an injunction and dismissing its complaint.

On October 29, 1943 the petitioner brought suit in the District Court to enjoin enforcement of a suspension order issued by the Office of Price Administration prohibiting petitioner from dealing in commodities rationed by Ration Order No. 16 for a 90 day period, but staying the effectiveness of the order for all but the first 15 days. The petitioner owns and operates four retail meat and grocery stores in Alexandria and Arlington, Virginia. On May 28, 1943 the Office of Price Administration commenced proceedings, under Procedural Regulation No. 4, to determine whether a suspension order should be issued against petitioner. A Notice of Hearing was served charging 10 violations of Ration Order No. 16 (R. 6–8). Pursuant to the Notice, a hearing was held on these charges before a Special Hearing Commissioner, terminating on June 30, 1943. On August 10, 1943 the Special Hearing Commissioner issued a suspension order (R. 11–16). The Commissioner found that the petitioner had violated the Ration Order by transferring meat without ration coupons on several occasions. The Commissioner likewise found that petitioner had sold meat at reduced point values on claim of its being in imminent danger of spoiling when in fact (a) it was not in such condition, (b) the claim was not made in good faith, and (c) the requirements of the regulation were not complied with. The

suspension was for a 90-day period with all but the first 15 days stayed. The petitioner appealed to the Hearing Administrator, the operation of the suspension order being administratively stayed.

On October 19, 1943, the Hearing Administrator affirmed the suspension order in his Decision on Appeal (R. 16–24). He advanced the period of suspension to commence on November 1, 1943.

On October 29, 1943, the petitioner brought this action to enjoin enforcement of the suspension order (R. 1). The suspension order was again administratively stayed, pending final determination of this cause. The petitioner, in its complaint, did not attack the statute as an unconstitutional enactment in violation of Article I, but merely alleged that the *administrative procedure* was unauthorized by statute, attempted to penalize petitioner, and was an unconstitutional delegation of legislative power and an illegal exercise of judicial power (R. 4). In an amendment to its complaint, filed on February 10, 1944, after respondent's answer, petitioner alleged that no substantial evidence had been adduced in the administrative proceeding against it, and that it had not been sufficiently apprised of the charges to be heard (R. 25–26).

Although the Record does not disclose the fact, during the oral argument in the District Court petitioner attempted to attack the Act as an im-

proper delegation of legislative authority. The respondents immediately suggested the need for a three-judge district court under 28 U. S. C. sec. 380a. Petitioner then stated that it was not attacking the Act, but what had been done under it. The District Court in its opinion (R. 27) observes:

> The plaintiff does not attack the constitutionality of the pertinent legislation but claims that defendant's conduct, being unconstitutional, was not within the scope of the legislation.

On January 27, 1944 the District Court entered judgment denying petitioner's prayer for injunction and dismissing its complaint. (R. 33). On February 5, 1944, the court filed Findings of Fact and Conclusions of Law (R. 29–33). The court upheld the suspension as authorized by statute and likewise held that there was no showing that the order entered was arbitrary or capricious, or that the finding of violations was not supported by substantial evidence. On March 6, 1944, the Court of Appeals affirmed the judgment below (R. 226–227). In a *per curiam* opinion the court upheld the suspension order on the basis of its decision in *L. P. Steuart & Bro.* v. *Bowles,* No. 793, now pending before this Court. The Court of Appeals likewise held that the administrative findings were supported by substantial evidence.

DISCUSSION

The only issue presented by the petition which was raised in the complaint and tried before the single-judge district court, and which would warrant review, is the question of statutory authority for suspension orders in connection with rationing under the Second War Powers Act, *supra*, pp. 2–3. That question is before the Court in *L. P. Steuart & Bro.* v. *Bowles*, No. 793, present Term.

Because of the pendency of the same question of law in the *Steuart* case, the Government does not oppose the petition for certiorari but suggests that action thereon may properly be withheld until decision is rendered in the *Steuart* case.

Respectfully submitted.

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MAY 1944.

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